IN THE

SUPREME COURT OF THE UNITED STATES

No. 414.

SONKEN-GALAMBA CORPORATION, a Corporation,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Respondent.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

To mention the obvious, respondent has not met the issue raised by this petitioner head-on.

Although respondent undertakes to discuss fleetingly the significance of isolated fragments of evidence, thereby overlooking the principal function of a certiorari proceeding, the primary question before this Court remains one of law. Simply put, is or is not "commercial knowledge" of a commodity the test to be applied in construing and applying a railroad tariff? We are confident that (1) such is the test, and (2) the Court of Appeals for the Tenth Circuit, in refusing to apply it, is in conflict with the many decisions of this Court and other federal appellate courts cited in the instant petition.

On page 7 of its answer, respondent states:

> "And petitioner has cited no authority, and we are confident it can find none, which holds that before aluminum ingots, pigs or slabs shall be classified and rated as such under this tariff provision it must first be proved that they are commercially known as such."

May we reply that, "if the tariff is addressed to a special class of shippers and uses words which have a particular or customary import among such class of shippers, that meaning should be given to such words, for that is how they reasonably would understand them." *Union Wire Rope Corp.* v. *A., T. & S. F. Ry. Co.*, (C. C. A. 8, 1933) 66 F. 2d 965, 967. Nor can respondent dismiss the compelling philosophy of the many decisions of this Court (Petition, pp. 10-12), on the mere ground that they involve "statutory import duties" and are, therefore, inapplicable.

Respondent, after first discarding commercial knowledge as the test of identification, proceeds to argue that Note 1 of its ingot tariff should be construed to mean that the material described therein is "commercially known" as ingot, making further evidence of such knowledge improper and inadmissible (Answer brief, p. 3). If this be true, the test of commercial knowledge would be rendered totally meaningless. Neither this respondent nor any carrier, by its own peremptory fiat, can dictate another's understanding. In short, commercial knowledge is exactly what the term implies. To ascertain it obviously it is not the understanding or intention of the carrier to which we must look, but rather to the understanding of the class of shippers dealing in the particular commodity.

On page 6 of its answer respondent in effect argues if ingot, to be commercially known as such, requires definite chemical specifications, such a test would be impractical "from a transportation standpoint." Such argument further

demonstrates the inherent weakness of respondent's position, and in fact concedes the point. If commercial knowledge is the test, and if that knowledge requires a definite chemical composition, it would seem incredible that a commodity should be considered commercially known as ingot in the absence of such a definite chemical composition. Furthermore, this very tariff provision permits transportation in packages. How does the carrier know what is actually in the package? Many subjects of commerce are not precisely identifiable from inspection or appearance. The carrier's protection is in the highly penal provision of the Transportation Act, which prohibits mis-billing. Lastly, the tariff provision in specific terms establishes commercial identity as the criterion. So commercial identity, in this case, is the identity involved even "from a transportation standpoint."

In short respondent denies, as does the Court below, that commercial knowledge is the appropriate test. Yet, through perplexing gymnastics, it urges that the commercial identity of a commodity can be ascertained without examining into the understanding of the very industry dealing therein! Railroad convenience thus neatly eclipses industry understanding as the "test" of commercial knowledge. We do not believe that this Court will permit the opinion below to discard the well established rule of commercial knowledge while at the same time, in order to foreclose review on certiorari, to manipulate the principle in such a way as to emasculate its efficacy.

Petitioner concedes that a number of recent I. C. C. cases have ill-advisedly espoused the views set forth by respondent. Not only are these cases not controlling, but, like the decision below, they are in conflict with the previous rulings of this and other federal courts. We do not think

that the I. C. C., or for that matter any governmental agency, will be permitted to justify such manifest error under a cloak of administrative expertise. Perhaps this Court will welcome this opportunity so to find.

Respectfully submitted,

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